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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202026

DATE: August 18, 1981

MATTER OF: Henry J. Bender

DIGEST: An employee whose basic rate of pay exceeded the maximum for a GS-10 was credited with compensatory time for occasional overtime work while on temporary duty. The employee voluntarily retired without using compensatory time and seeks payment for the overtime work. Since agency regulations require that an employee earning at a rate in excess of that for GS-10 receive only compensatory time for occasional overtime and that upon voluntary retirement any unused compensatory time be forfeited, no basis exists to pay the employee.

Mr. W. Smallets, Finance and Accounting Officer of the National Security Agency, requests an advance decision on whether a retired employee's unused compensatory time may be retroactively converted to paid overtime. Since the employee's overtime work was occasional and his status was such that he was only entitled to compensatory time for overtime work, the conversion of the compensatory time to paid overtime may not be allowed.

From May 25, 1980, to July 19, 1980, the employee, Henry J. Bender, whose position was exempt from the provisions of the Fair Labor Standards Act, was on temporary duty and worked overtime on various days. He was credited with compensatory time as opposed to being paid overtime because of an agency regulation precluding one in his pay status from receiving other than compensatory time for irregular or occasional overtime.

On August 28, 1980, Mr. Bender retired without having used 58.5 hours of compensatory time which he then had to his credit although he had been advised by an appropriate official to use the compensatory time prior to retirement because he would not be compensated for it. After Mr. Bender's retirement and at his urging, his former supervisor retroactively approved changing his time records to show the 58.5 hours as payable overtime rather than compensatory

[Conversion of Retired Employee's Unused Compensatory Time to Paid Overtime]
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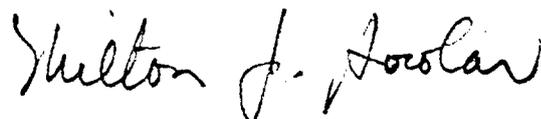
time. The Finance and Accounting Officer questions that action in view of agency regulations which appear to prohibit payment in this case.

Under 5 U.S.C. § 5543(a)(2), the head of an agency may require an employee whose rate of basic pay is in excess of the maximum for GS-10 to earn compensatory time for "irregular or occasional" overtime work instead of being paid overtime pay under 5 U.S.C. § 5542. Employees of the National Security Agency are subject to this statutory requirement by agency regulations.

The record indicates that Mr. Bender was in grade GG-12/10, the rate for which was in excess of the maximum for grade GS-10. As to whether his overtime was irregular or occasional, the Finance and Accounting Officer indicates it was irregular, and its performance appears to have been an unusual occurrence and hence it was within the definition of occasional as used in 5 U.S.C. § 5543(a)(2). See Earl N. Mittleman and Paul G. Warner, B-181822, January 3, 1975; and M. N. Pfeiffer, B-181211, November 6, 1974. Thus, the agency correctly credited the employee with compensatory time. Having done so, the agency's regulations further provide that a voluntary retirement, such as taken by the employee here, causes unused compensatory time to be forfeited.

This is consistent with our decisions regarding the forfeiture of compensatory time and overtime compensation in lieu thereof in that it has been held that an employee properly granted compensatory time who fails to use that time within the period prescribed by regulation loses entitlement to compensatory time. As an exception it has been held that overtime pay may be paid for unused compensatory time if failure to use such time within the period prescribed was due to the exigencies of the service or the failure of the agency to grant time off requested by the employee. See 31 Comp. Gen. 245 (1952); compare 26 id. 750 (1947).

Accordingly, the employee may not be paid for his unused compensatory time.



Acting Comptroller General
of the United States